"What is the offence the accused is charged with?" He is charged with the offence of "trafficking" in a dangerous drug, heroin, an offence punishable, under section 39B(2), with death. Given the definition of "trafficking" in section 2, it does not matter in what amount of the dangerous drug an accused is charged with trafficking – it is trite law that if he trafficked in one gram of dangerous drug, the sentence is still death.

Since the offence he has been charged with under the Act is punishable with death, then it falls within the provisions of section 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

That the nett amount of the dangerous drug is specified in a charge for trafficking does not mean that if an accused is convicted for an offence of trafficking in that drug, he would not be sentenced to death if the amount of the dangerous drug involved in the trafficking is less than the amount specified for the relevant drug in paragraph (i), (ii), (iii), (iiia) or (iv) of section 37(da), assuming he was in possession of the drug. These paragraphs merely raise presumptions of trafficking in the relevant drug and the prosecution may rely on the relevant provision if the accused is found in possession of the drug to raise a case of trafficking in that drug until the contrary is proved by the accused.

To my mind therefore, the reliance by counsel for the applicant on the case of *Ho Chuan Chong*(1) and on Article 5 of the Federal Constitution is misconceived and I dismiss the application for bail.

Application dismissed.

Solicitors: *Manjit Singh Sachdev & Co.*

PUBLIC PROSECUTOR v. LIIK CHING KWONG

[A.Cr.J. (Chong Siew Fai J.) August 21, 1987]

[Sibu – Criminal Appeal No. 23 of 1983]

Criminal Procedure – Road traffic accident – Statement to police sergeant – Admissibility of – Charge of driving without due care and attention – Failure to render assistance to the injured person – Failure to stop after accident – Road Traffic Ordinance 1960 – Criminal Procedure Code (FMS Cap. 6), ss. 112 & 113.

The accused was charged with three offences. The first charge was for driving without due care and attention. The second charge was for failing to render assistance to the injured person and the third charge was for failing to stop his vehicle after being involved in a road accident. All the charges arose out of one and the same transaction.

The accused was acquitted on the first charge but was convicted on the second and third charges. He was fined $500 on the second charge and fined $80 on the third charge. In addition, he was suspended from driving for one year and his driving licence indorsed.

The prosecution appealed against the acquittal on the first charge. The accused cross-appealed against the convictions on the other two charges.

The prosecution evidence was based mainly on a statement made by the accused to a police sergeant.

Held, dismissing the appeal of the prosecution and allowing the accused's cross-appeal: (1) the statement made by the accused to the police sergeant was wrongly admitted because:

(a) it was made to a police sergeant and not to an officer of or above the rank of an inspector as required under the Criminal Procedure Code, and

(b) the making of the statement contained an element of threat;

(2) the convictions were set aside and the fines were refunded;

(3) the order of suspension of the accused's driving licence and the indorsement on the licence were set aside.

Cases referred to:

(1) *Jayaraman & Ors.* v. *Public Prosecutor* [1982] 2 M.L.J. 306, 311-312.
(2) *Abdul Ghani bin Jusoh & Anor.* v. *Public Prosecutor* [1981] 1 M.L.J. 25.
(3) *Public Prosecutor* v. *Ng Goh Weng & Anor.* [1979] 1 M.L.J. 127.
(4) *R.* v. *Smith* [1959] 43 Cr. App. R. 121, 126.
(5) *SJF (an infant)* v. *Chief Constable of Kent, ex parte Margate Juvenile Court* Times, 17 June 1982.

CRIMINAL APPEAL.

Puan Siti Aishah bt. Othman (Deputy Public Prosecutor) for the appellant.

Cheng Kwang Li for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J.: This is a case involving an appeal by the prosecution against the acquittal of the accused on a charge of driving without due care and attention, and an appeal by the accused against his convictions on two offences, *i.e.* failure to render assistance to the injured person and failure to stop his vehicle after involving in a road accident. All the three charges arose out of one and the same transaction. On the two charges that the accused was convicted, he was fined $500 and $80 respectively. In addition, he was suspended from driving for one year and his driving licence indorsed. I understand from the defence that the fines had been paid. The disqualification from driving, however, was suspended pending this appeal.

Background

The facts and circumstances of the case may be briefly summarized as follows:

On July 11, 1981 at about 10.00 p.m., P.W.1, Stanley Chin, and P.W.2, Chung Ah Siong, were walking near the edge of the road, the Brooke Drive, Sibu, when suddenly, a car coming from the opposite direction collided with and knocked down P.W.1 who became unconscious. The car went on after the collision without stopping. With the help of some others, P.W.2 brought him to the hospital where he (P.W.1) was found to have sustained serious injuries particularly on the left leg. Both P.W.1 and P.W.2 were unable to identify the driver of the car.

The following morning (July 12, 1981), the accused went by car to the Central Police Station, Sibu, where he met P.W.4 Tambi, a police sergeant (retired in September 1982).

According to the accused, he learned about an accident from his brother (D.W.2) the previous night and his motive (which was not accepted by the learned trial magistrate) of going to the police station was to find out whether the persons involved were his friends and whether they were injured.

Following the accused's visit to the police station, his car was sent for examination and a statement (exh. P5) was taken from him by P.W.4, Sgt. Tambi. No oral evidence was adduced as to the actual examination of the car but an examination record (exh. P4) which, in the main, is a record of the brake test of the car was admitted as evidence. The defence objected to the admissibility of both exh. P5 and exh. P4 but was unsuccessful.

As the ground of appeal on exh. P4 was abandoned and in the light of my decision in this appeal, strictly no more need be said about the exhibit though I have grave doubts about the propriety of acceptance, as evidence, the entry, as such and without more, relating to the damage to the car in exh. P4, having regard to the following wording in section 103(1) of the Road Traffic Ordinance 1960:

> "... any question arises as to whether a motor vehicle does or does not comply with any provision of this Ordinance or any regulation made hereunder, relating to the matter in question;",

and to the fact that the damage *per se* is not the subject-matter of compliance or otherwise of the Ordinance or any regulation made thereunder.

At the close of the prosecution case, the accused was acquitted and discharged on the charge of careless driving, but was called upon to enter his defence on the other two charges.

In his evidence, the accused denied having any connection with the accident. He denied having admitted his involvement in the statement recorded by Sgt. Tambi. His defence was rejected by the trial court. And, as stated earlier, he was convicted on the charges of failing to stop and to render assistance after the accident.

In this appeal, counsel for the accused argued against the admissibility of exh. P5. It is obvious that this, together with two other matters with which I shall deal in a moment, are the only materials upon or from which the identity and the guilt of the accused in relation to the three charges could be established or adequately and properly inferred. Accordingly, it is necessary to consider them separately.

Exh. P5: accused's statement to P.W.4 Sgt. Tambi

There can be no doubt that the learned trial magistrate was fully aware of the importance of exh. P5 in this case, as demonstrated in his judg-

ment in which he stated (p. 33 of the notes of proceedings):

"The admission as evidence of this statement (exh. P5) is crucial to the case because it is the only piece of evidence that directly links the accused, and the car that he was driving, to the accident, the rest of the evidence being mainly circumstantial."

In objecting to the admissibility of this statement in evidence at the trial, counsel for the defence, so far as relying on the Criminl Procedure Code, had cited only section 112 thereof. This might well have led or contributed to the learned trial magistrate dealing with the said section 112 solely.

It is important to realize that at the trial of this case in the Magistrate's Court, exh. P5, then sought to be admitted in evidence, was not that of a witness but that of an accused person. Therefore, consideration must be given not only to section 112 of the Criminal Procedure Code but also to section 113 thereof. The historical background for substituting the present entire section 113 and for adding subsection (v) to section 112 of the Criminal Procedure Code in 1976 was explained in the judgment of Suffian L.P. in *Jayaraman & Ors.* v. *Public Prosecutor.*[1] (See also *Abdul Ghani bin Jusoh & Anor.* v. *Public Prosecutor*[2] per Wan Suleiman F.J. at pp. 26-27.)

In our present case, exh. P5, in my opinion, is inadmissible for the following reasons:

(1) To render a statement of an accused person admissible, it must have been made to a police officer of or above the rank of Inspector (section 25(1) of Evidence Act 1950; section 113(1) of Criminal Procedure Code). P.W. 4 Tambi, to whom exh. P5 was made, was a police sergeant. The rank of a police sergeant classified under the term "Junior Police Officers" is clearly below an Inspector (see the First Schedule to the Police Act 1967). In *Public Prosecutor* v. *Ng Goh Weng & Anor.*[3] Suffian L.P. said in relation to even a cautioned statement (p. 128):

"However, not all cautioned statements are admissible. A cautioned statement is admissible if and only if it satisfies the conditions set out in section 113. In particular we mention two conditions: that it should be made to a police officer of or above the rank of Inspector, and that it was made voluntarily. If clearly the statement was made to an officer below the rank of Inspector, then the duty of the committing magistrate is easy – he simply rejects it."

(2) Under section 113(1) proviso (a)(i), the statement of an accused person shall not be admitted if it appears to the court that the making thereof to have been caused by any threat having reference to the charge. "The court has been at pains to hold that even the most gentle ... threat ... will taint a confession" (*R.* v. *Smith*[4] per Lord Parker C.J.). In his evidence, P.W.4 said he told the accused in Malay to the effect that: "you must tell the truth or else you will be charged" (p. 13 of the notes of proceedings). Clearly, the words contain the element of threat.

I therefore hold that exh. P5 had been wrongly admitted.

In deciding the issue of the admissibility of the statement exh. P5, the phrase "trial-within-trial" was used. I would mention in passing that strictly there is no question of "trial-within-a-trial" in a case before a magistrate. Unlike a case before a judge and jury or a judge and assessors where jury or assessors would be asked to leave the court when an issue is being tried which at that stage they have no business to hear, *e.g.* the admissibility of evidence, in a trial before a magistrate, nothing of that sort will happen for the magistrate is a judge of both law and fact: *SJF (an infant)* v. *Chief Constable of Kent, ex parte Margate Juvenile Court.*[5]

Two other matters need to be dealt with. The first is that there is the evidence from P.W.4 that on the morning of July 12, 1981 the accused had in his (P.W.4's) office admitted to him as being "the one who had knocked down Stanley Chin". In my opinion, this admission, which is oral, ought not to have been admitted because the alleged admission was made to a police officer below the rank of a Police Inspector, *i.e.* a sergeant (see section 113(1) of Criminal Procedure Code and the reasoning above) and also at the time of the alleged oral admission, the accused had not been arrested and no explanation was given as to why it was not reduced into writing. In *Jayaraman & Ors.* v. *Public Prosecutor,*[1] in answer to a question specifically referred, Suffian L.P. decided that an oral statement made by a person before his arrest to a police officer of or above the rank of Inspector could be admitted as evidence against him where the statement has not been reduced into writing, provided there was a reasonable explanation for the failure.

In our present case, no explanation at all, let alone reasonable or otherwise, was given.

Secondly, there is, in this case, the plea of guilt and admission by the accused to the charge of using the vehicle with its handbrake not being properly maintained. According to the record, the plea was made on June 10, 1982 and the date and time of user as stated in the charge and in the fact given by the prosecution were 2315 hours or 11.15 p.m. on July 11, 1981. Subsequently, however, the three charges in the present appeal were amended and it was ascertained in this appeal from counsel that the amendment was the alteration of the time "2315" hours to "2200" hours. In the circumstance, the guilty plea and the admission of fact by the accused are of no help to the prosecution.

With the exclusion of the accused's statement, exh. P5, and the evidence of P.W.4 relating to the accused's admission, it is, as indeed rightly conceded by the prosecution, obvious that the convictions cannot stand and that the appeal by the prosecution against the order of discharge and acquittal respecting the charge of careless driving must also fail.

For the above reasons, the appeal of the prosecution against the order of discharge and acquittal is dismissed while that of the accused is allowed and the convictions are set aside. The fines, if already paid, be refunded to the accused and the order of suspension of his driving licence and the indorsement of the particulars of his convictions therein be set aside.

Order accordingly.

Solicitors: *Cheng & Ting Co.*

PUBLIC PROSECUTOR v. LIM KIN ANN

[O.Cr. J. (L.C. Vohrah J.) May 16, 1987]

[Johor Bahru – Criminal Trial No. 4 of 1984]

Criminal Law – Dangerous drugs – Trafficking in 383 gm. of heroin on own behalf – Prima facie case – Defence of denial – Sentence of death – Dangerous Drugs Act 1952, s. 39B(1)(a) & (2).

Evidence – Statement by accused before arrest – Caution not administered – Admissibility of statement – Dangerous Drugs Act 1952, s.37A(1)(b) – Criminal Procedure Code (F.M.S. Cap. 6), s.15(i).

Criminal Procedure – Arrest – "After his arrest" – Criminal Procedure Code (F.M.S. Cap. 6), s. 15(i) – Dangerous Drugs Act 1952, s. 37A.

The accused was charged with trafficking on his own behalf a dangerous drug, *i.e.* 383 grammes of heroin, in contravention of section 39B(1)(a) of the Dangerous Drugs Act 1952. On May 19, 1983, Probationary Inspector Yeow (PW1) led six detectives to house No. 23, Jalan Pasir Pelangi, Johor Bahru, where he found, among other things, two black brief-cases (P.8A and P.8B) which the accused said were his. The accused opened P.8A where Yeow found, among other things, cash of M$15,300. The accused refused to open P.8B, which Yeow prised open with a test-pen. In P.8B Yeow discovered, among other things, three packets (P.37A, P.37B, and P.37C), a small daching (P.38), a plastic spoon (P.33A), a metal spoon (P.33B), 8 plastic packets (P.36) and two pieces of newspaper (P.35). The accused then offered Yeow $50,000.00 to drop the matter. Yeow rejected the offer. The accused was then arrested. The three packets were found by the government chemist to contain 383 gm. of heroin. At the close of the prosecution case, counsel for the accused contended that all statements uttered by the accused surrounding the examination of the contents of the 2 brief-cases were not admissible under s.37A(1)(b) of the Act because no caution had been administered prior to the making of the statements and should therefore be expunged from the record. The learned judge held that the statements were made before arrest and were therefore admissible. He called upon the accused to make his defence.

The accused gave evidence on oath and his was the only evidence for the defence. In a nutshell it was a denial of the admission he made regarding ownership of the incriminating brief-case P.8B and of the knowledge of the contents therein.

Held: (1) in the light of all the evidence in this case, the defence did not raise any doubt in the prosecution case. The learned trial judge did not believe the accused's story. On the contrary, PW1 and PW4 and PW6 were truthful witnesses and the defence went to strengthen the prosecution case;

(2) the accused was found guilty as charged, convicted and sentenced to death.

Case referred to:

(1) *Public Prosecutor* v. *Salleh bin Saad* [1983] 2 M.L.J. 164.